6-17-1976

Clay Pearson and Edna T. Pearson, his wife v. Jean Hamilton

Petition for Rehearing 1975-SC-0638

PETITION FOR REHEARING

SUPREME COURT OF KENTUCKY

File No. 75-638

CLAY PEARSON and EDNA
T. PEARSON, his wife ..... APPELLANTS

V.

JEAN HAMILTON ..... APPELLEE

APPEAL FROM THE MADISON CIRCUIT COURT
HON. JAMES S. CHENAULT, JUDGE

PETITION FOR REHEARING

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This is to certify that a true copy of this petition has been served upon Hon. John D. Sword, attorney for appellee, Sword & Floyd, Taylor Building, Richmond, Kentucky 40475, and Hon. James S. Chenault, Judge of the Madison Circuit Court, Richmond, Kentucky 40475, this 16 day of June, 1976.

Attorney for Appellants

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STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the trial court's findings of a mutual "tilt", existing for many years without "fault" on the part of either party, and a mutual acquiescence in said condition, are wholly unsupported by the evidence and, consequently, are clearly erroneous?

2. Whether the trial court's independent viewing of the premises can either supplement or supply evidence upon which to base the court's finding of mutual acquiescence, particularly where the viewing was without notice to, or accompaniment by, the parties or their counsel and where there was no prior agreement that the court should either visit the premises or base its decision upon what was revealed by the inspection?

3. Whether the trial court erred in giving any consideration to a view of the premises on a motion for a summary judgment?

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MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

The appellants adopt and reaffirm their original Statement of the Case.

ARGUMENT

I. THE TRIAL COURT'S FINDINGS OF A MUTUAL "TILT", EXISTING FOR MANY YEARS WITHOUT "FAULT" ON THE PART OF EITHER PARTY, AND A MUTUAL ACQUIESCENCE IN SAID CONDITION, ARE WHOLLY UNSUPPORTED BY THE EVIDENCE AND, CONSEQUENTLY, ARE CLEARLY ERRONEOUS.

A. THE MUTUAL "TILT"

Two witnesses testified as to the respective "tilting" of the parties houses. Both were licensed surveyors and civil engineers. No other proof was elicited on behalf of either party prior to judgment.

Charles Black, a licensed surveyor and civil engineer, determined that a) the appellants' house is plumb or vertical; b) the appellants' house does not extend beyond the parties mutual property line; c) the appellee's house is not plumb and therefore "tilts"; and, finally, d) the appellee's house does extend beyond and enroach over the parties' property line. Mr. Black was able to testify to the foregoing facts because he established the location of the parties' mutual property line.

Ballard Luxon, III, also a licensed surveyor and civil engineer, *did not ever attempt to establish the property* line. He did testify that both parties' houses "tilted", but did not attempt to determine whether the "tilt" exceeded the boundaries of the parties' respective lots. Consequently, he was unable to testify as to whether either party's house enroached upon the other's property.

Messrs. Black and Luxon were the only two witnesses in the case at bar. Accordingly, it is uncontroverted in the record (or elsewhere) that the appellants' house is subject to an encroachment by the appellee's house, which house extends beyond its legal boundaries.

B. MUTUAL ACQUIESCENCE

Mr. Black did not testify as to the length of time during which the appellee's house had been out of plumb, or extending beyond the appellee's boundaries.

Mr. Luxon testified that ". . . the first time I have ever noticed it [the "tilting" condition] was when it was brought to my attention. I really never paid any attention to it before. When Murray called me a year, two years ago, and asked me to go check it." (Ballard Luxon deposition, pp. 8-9.) Mr. Luxon's deposition was taken on April 4, 1975. The Complaint herein was filed by the appellants on August 8, 1973. Accordingly, Mr. Luxon was testifying that he first noticed the "tilt" approximately four months prior to the filing, by appellants, of the instant litigation.

No additional evidence exists in the record which would tend to show that the "tilting" pre-existed the instant litigation by a longer period than four months. In short, there is no support whatsoever in the record for a finding by the Court that the parties had "acquiesced" in the tilting condition for "many years". Nor is there any evidence that the appellants' house *ever* extended beyond its own boundaries.

The evidence not only fails to support the trial court's findings with respect to a mutual

acquiescence in a "tilting" condition for many years; it, in fact, belies such a finding. This finding of the trial court, which forms the sole basis for the trial court's judgment, is clearly erroneous. It cannot stand and the judgment upon which it is based cannot stand. CR 52.01; *Massachusetts Bonding & Ins. Co.* v. *Huffman*, Ky., 340 S.W.2d 447.

II. THE TRIAL COURT'S INDEPENDENT VIEWING OF THE PREMISES CANNOT EITHER SUPPLEMENT OR SUPPLY EVIDENCE UPON WHICH TO BASE THE COURT'S FINDING OF MUTUAL ACQUIESCENCE, PARTICULARLY WHERE THE VIEWING WAS WITHOUT NOTICE TO, OR ACCOMPANIMENT BY, THE PARTIES OR THEIR COUNSEL AND WHERE THERE WAS NO PRIOR AGREEMENT THAT THE COURT SHOULD EITHER VISIT THE PREMISES OR BASE ITS DECISION UPON WHAT WAS REVEALED BY THE INSPECTION.

The appellants have unequivocably established that the testimonial evidence does not even begin to support the trial court's finding of a mutual acquiescence by the parties for "many years". The evidence which forms this record on appeal merely shows that some tilting condition pre-existed the filing of the complaint herein by a period of four months.

In order to substantiate the trial court's findings, it is necessary that this Honorable Court consider the trial court's observations, gleaned from its independent viewing of the premises, to be

material and substantial evidence. In other words, in order to transform a period of four months into the "many years" of acquiescence necessary to work an estoppel, this Court must treat the trial court's observations as substantial, concrete, judgment-supportive evidence. This, the appellants submit, may not be done without overruling a whole line of cases, beginning with *Owings* v. *Talbott*, 262 Ky. 550, 90 S.W.2d (1936) and continuing through *Commonwealth, Dept. of Highways* v. *Hackworth*, Ky., 400 S.W.2d 219 (1966), all of which specifically hold that views by trial courts and juries of premises cannot either supplement the evidence adduced or supply evidence omitted.

In its Memorandum Opinion, a copy of which may be found in the Appendix hereto, this Court cites as authority for its affirmance a case which is entirely distinguishable from, and wholly inapposite to, the case at bar. In *Fitzhugh* v. *L & N Railroad Company*, 300 Ky. 509, 189 S.W.2d 592 (1945), this Court refused to reverse the trial court's decision, *because the record therein showed that the parties agreed that the court "should personally view the situation, and that he was accompanied by the attorneys for both sides when he did so." Fitzhugh,* supra at 593 (emphasis supplied). No such agreement or procedure was reached or followed in the case at bar.

The *Fitzhugh* decision, however, does strongly reiterate with approval the mandates of *Owings*, supra, as follows:

> Of course, it would not be proper without a definite agreement to that effect for a judge to base his finding alone upon what he saw and to ignore the testimony of the witnesses. . .

Fitzhugh, supra at 593. Furthermore, *Fitzhugh* stands for the proposition that the observations of the trial court have no evidentiary value, as is borne out by the following:

> We observed there [*Wilcox* v. *Lee*, 264 Ky. 65, 94 S.W.2d 294] as we may here *that the recitation in the judgment of what the judge saw has no materiality, for it is but a statement of the facts brought out, in part at least, in the testimony.*

Fitzhugh, supra at 593 (emphasis supplied.)

In the case at bar, the evidence showed at most that the houses had tilted for four months. In order for the trial court to correctly conclude that the tilt had existed for "many years", its observations of the conditions must be considered material and must be considered substantial evidence. If this is what this Honorable Court is saying in its Per Curiam Opinion in the case at bar, then it must overrule *Owings* v. *Talbott* and the entire line of cases which

cite it as authority, including the *Fitzhugh* decision, cited by this court in its May 28, 1976 opinion.

When the record is stripped of the trial court's observations, as must be done pursuant to *Owings*, *Fitzhugh* and that line of cases, there is no support of any substance in the record for the trial court's findings, and they are, consequently, clearly erroneous. The ensuing judgment, based on these findings, must be reversed.

III. THE TRIAL COURT ERRED IN GIVING ANY CONSIDERATION TO A VIEW OF THE PREMISES ON A MOTION FOR A SUMMARY JUDGMENT.

This case was decided, pursuant to an interlocutory Order entered by the trial court on October 9, 1974 (Transcript of Record, p. 27), on a motion for summary judgment. There was no joint motion to submit the case for final judgment, nor was a trial ever held.

In deciding a motion for summary judgment, the trial court is entitled to consider "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with affidavits . . ." CR 56.03. The Rule *does not permit the Court to consider a view of the premises.* The rationale for a view of the premises is to enable the court to understand and to apply the evidence adduced at trial, which presupposes that some genuine issue exists as to a material fact, which can only be

resolved by an observation of the premises. If, however, no dispute exists as to any material fact, the viewing would seem superfluous, and a summary judgment could easily be rendered in its absence.

The trial court was required to render its decision on the motion for summary judgment on the basis of everything in the record. Clay, Ky. Prac., Vol. 7, CR 56.03 (Comment 6). Instead, it rendered its decision on the basis of what it observed outside of the record. This clearly violates the requirements of CR 56, and mandates a reversal of the improperly considered judment.

CONCLUSION

In affirming the trial court, this Court is failing to even pay lip service to the tenets of *Owings* v. *Talbott*, supra, and the line of cases citing that decision with approval. This Honorable Court is allowing the trial court to supplement or supply evidence to the effect that the alleged "tilting" of the houses had continued for "many years". In the absence of the trial court's observations, it could only be concluded that the tilt had existed for approximately four months prior to the filing of appellants' Complaint herein, considerably less than the "many years" duration necessary for a finding of mutual acquiescence and estoppel.

The decision of this Court on May 28, 1976 flies in the face of *Owings* and *Fitzhugh*, inter alia, and must therefore, the appellants submit, be vacated on rehearing. The appellants are manifestly entitled to a reversal of the judgment rendered by the Madison Circuit Court.

Respectfully submitted,

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APPENDIX

RENDERED: May 28, 1976

SUPREME COURT OF KENTUCKY
75-638

CLAY PEARSON AND EDNA
T. PEARSON — APPELLANTS

APPEAL FROM MADISON CIRCUIT COURT
V. HONORABLE JAMES S. CHENAULT, JUDGE
CIVIL ACTION NO. 7647

JEAN HAMILTON — APPELLEE

MEMORANDUM OPINION PER CURIAM
AFFIRMING

Clay Pearson and Edna T. Pearson seek to recover of Jean Hamilton damages in the amount of $10,000, permanent injunction enjoining the encroachment of her house upon their property, and an order requiring her to remove that portion of her house overhanging their property. The encroachment was the result of a "tilting" of the two houses. One expert witness testified that the Hamiltons' house was leaning about two to three inches over the Pearson line. However, a second expert witness testified that the house of Hamilton was leaning approximately 1/2 inch toward the house of Pearson, while the house of Pearson was leaning approximately 3/4 of an inch toward the house of Hamilton.

After the witnesses had testified, the trial court visited the premises, viewed the houses, and found that at two points the houses overlapped each other by one to two inches. It was further determined that this condition had existed for a substantial period of time, the court observing that the roof on one of the houses, which appeared to have been there for several years, had been so constructed as to accommodate conditions existing at the point where the houses touched. On the basis of the court's finding a judgment was entered dismissing the claim for damages and denying the parties any relief for the reason that the mutual "tilt" had existed for many years without "fault" on the part of the parties and that each of them had acquiesced in this condition down to the time of the filing of the present action.

Pearson attacks the findings and judgment of the court on the basis that they were not supported by substantial evidence in that the court relied upon what it has observed upon a surreptitious viewing of the premises. This court notes that the trial court did not rely wholly upon the fruits of its observation but took into consideration the evidence of the experts, both of whom testified that there was a tilting of the houses. This action was tried without a jury; however, we dare say that if this had been a jury trial there would have been some rather insistent motions that the jury be permitted to view

the premises. It is within the sound discretion of the trial court to permit a jury to visit and observe the property involved in a trial. KRS 29.301. There is no valid reason why a trial judge, when hearing a case without a jury, should not be extended the same privilege of viewing the premises and considering what he observed in disposing of the action.

If the trial court had neglected to detail its observations and correlate them with evidence in the record, there might be some merit in a claim that the findings of the court were not supported by substantial evidence. However, such is not the case in this instance, for the trial court's viewing of the premises was clearly within the scope of the evidence of the expert witnesses and served only to clarify existing conditions. These circumstances lead us to but one conclusion and that is that the findings of the court were not clearly erroneous and, that being the case, this court will not disturb the judgment of the trial court. CR 52.01. Cf. Fitzhugh v. L & N Railroad Company, 300 Ky. 509, 189 S.W.2d 592 (1945).

The judgment is affirmed.

All concur.

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